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ALEXANDER L. STEVAS,
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No.:_____

IN THE

Supreme Court of the United States

October Term, 1982

JAMES BURKE,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the trial court erred in quashing, on First Amendment grounds, petitioner's subpoena of documents relating to a directly relevant magazine article?

List of the Parties

Apart from the party named in the caption of this Petition, the other parties involved in the trial were Anthony Perla, Rocco Perla, Paul Mazzei and Richard Kuhn, who were also convicted of the offenses charged.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, James Burke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction entered against the petitioner by the United States District Court for the Eastern District of New York (Bramwell, J.).

Opinion Below

The opinion of the Court of Appeals, reported at 700 F.2d 70 (2d Cir. 1983), appears in the appendix hereto at pp. 1a-28a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was January 28, 1983. The petitioner filed a timely petition for rehearing, which was denied on March 8, 1983 (Appendix, pp. 29a-30a). The Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

Statutory and Constitutional Provisions Involved in the Case

Federal Rules of Criminal Procedure, Rule 17(c):

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

First Amendment to the United States Constitution:

> Congress shall make no law ... abridging the freedom of speech, or of the press ....

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process ....

Statement of the Case

James Burke was convicted, after a jury trial, of a Racketeering Offense, Title 18 U.S.C. § 1962(d); Sports Bribery, Title 18 U.S.C. § 224; and a Travel Act violation, Title 18 U.S.C. § 1952. As a result of this conviction, Burke was sentenced to a 20-year term of imprisonment.

Evidence At Trial

1. The Overall Case

The government's proof showed that in the summer of 1978 a small group of Pittsburgh gamblers found an opportunity to corrupt Richard Kuhn, a 21-year-old senior on the Boston College basketball team. Rocco Perla, a schoolmate of Kuhn, told his brother, Anthony Perla (later to become his co-defendant), that Kuhn "wanted to do business" during the upcoming 1978-1979 basketball season. (T 191-92)[1] The "business" was a point shaving scheme with corrupted players attempting to manipulate the number of points by which the team won (or in some cases lost) in relation to the established betting "line" on the game, thus enabling informed gamblers to make informed bets. For example, if Boston College were favored by professional bookmakers to win a particular game by ten points, a wager on Boston College would only be won if the opposing team were defeated by more than ten points. Thus, if the points were "shaved" and the corrupt objective was to win by less than ten points, gamblers could very comfortably bet on the opposing team. (T 197-99, 1511-17)[2]

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[1] The letter "T" refers to the trial transcript.

[2] Point shaving is an extraordinarily subtle form of "fixing" a game. Experienced coaches are rarely able to detect the corrupt player or players. (T 1999) In fact, such a scheme is so subtle that, as shown by the proof in this case, it often doesn't work.

Anthony Perla shared the information about Kuhn with another Pittsburgh gambler, co-defendant Paul Mazzei. Mazzei and Anthony Perla believed, however, that this opportunity was too large for them to handle alone. Pittsburgh, it seems, was too small a city to provide the network of bookmakers needed to fully exploit the rigged games. (T 192) In addition, this Pittsburgh combine needed protection against bookmaker-victims who might discover that they were taking bets on fixed games. (T 193)[3] In order to satisfy these needs and to get the scheme off the ground, Mazzei contacted Henry Hill, a miscreant from New York City who would later appear at trial as a protected government witness.[4] On July 14, 1978, while still a "prisoner" at a Manhattan Community Treatment Center, Hill flew to Pittsburgh and met with Mazzei. (T 190-91) Upon learning of the point shaving scheme, Hill expressed an enthusiastic interest. (T 192) A month or two later, Hill returned to Pittsburgh and met with Anthony Perla who supplied further details. (*Id.*)

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[3] The fear of discovery was quite realistic. Zacharie Franzi, a Las Vegas odds maker, noticed radical changes in the betting line on Boston College games during the 1978-1979 season, indicating that unusually large bets were placed on these games. This meant, to Franzi, that the games were either fixed or that bettors had other kinds of inside information. (T 524-26)

[4] If a tough and hardened criminal were what the Perlas and Mazzei were looking for it is difficult to imagine that they could have found any one better suited than Hill. Starting with a military conviction in 1965, Hill described his record of arrests and convictions for bookmaking, tax offenses and extortion. (T 175) Hill also admitted to robbery, arson, truck hijacking, narcotics trafficking, illegal possession of weapons and participation in murder. (T 180-81) When Hill was in a federal prison as a result of his extortion conviction he engaged in bribery of guards, bookmaking and narcotics trafficking. (T 181-82) After his release from prison in 1978, Hill resumed his career by selling heroin, cocaine, marijuana and quaaludes in addition to committing robberies and trafficking in stolen weapons including pistols, machine guns, rifles and shotguns. (T 182-83) Hill himself was a drug addict. (T 182) Finally, after apprehension and indictment by New York State on narcotics offenses carrying terms of life imprisonment, Hill decided to furnish information to federal authorities. (T 183-84)

At the second meeting the conspiracy was hatched. The government's proof of the enterprise and its activities was quite convincing. Regarding Mazzei, the Perlas and Kuhn, Hill's testimony about payoffs to players and the resultant impact on the games was strongly corroborated. As a foundation, telephone and hotel records were introduced to show contact and meetings between Hill and his fellow conspirators. But the case against Burke's co-defendants did not stand on the word of Hill alone.

James Sweeney, the Boston College team captain during the 1978-1979 season, testified that Kuhn solicited his participation in the point shaving scheme in the early Fall of 1978. (T 912-13) Kuhn told Sweeney that during the past summer he was in touch with people from Pittsburgh who were interested in point shaving. (*Id.*) Sweeney, according to his testimony, rejected an invitation to participate in the scheme. (T 913) Sometime in November, after basketball practice, Kuhn asked Sweeney to come with him to a meeting with Rocco Perla, whom Sweeney had met before, and Rocco's brother Anthony, whom Kuhn described as his "surrogate father." (T 915) That evening, at an airport motel, Sweeney met the Perlas and Henry Hill. (T 916) Hill attempted to convince Sweeney to participate in the scheme, telling the young athlete that the financial rewards were great and that the team would not suffer since point shaving would still allow victory. (T 918-19) According to Sweeney, Hill repeatedly said that "people in New York" were backing the operation and that it would be in his best interest to cooperate. (*Id.*) Hill said that for each game that was successfully engineered, the cooperating player would receive $2,500. (T 923)

Sweeney claimed, at trial, that Hill frightened him into saying that he would cooperate, although he never intended to do so. (T 923, 927-28) After reviewing the Boston College basketball schedule, the group

agreed that Boston's upcoming game with Providence would be the trial balloon. (T 925-26)

On the afternoon of the Providence game, December 6, 1978, Kuhn told Sweeney that their mission was to win the game by fewer than seven points. (T 929-30) The scheme failed, however, when the Boston team won by 19 points with Sweeney "trying [his] hardest to win." (T 930) After the game, Kuhn berated Sweeney for failing to keep the game close. (T 931) A few days later Kuhn told Sweeney that Anthony Perla had described Sweeney as "unreliable" and that he wanted Kuhn to speak to players Ernie Cobb and Joe Beaulieu to see if they were interested in participating. (T 932)

On December 16, 1978, Boston College played Harvard at the Boston Garden. (T 933) Before the game, Kuhn told Sweeney that Hill and Rocco Perla would attend the game to "make certain that all the people were cooperating." (*Id.*) Kuhn also told Sweeney that Ernie Cobb, the team's leading scorer, would be involved. (T 936-37) Boston College defeated Harvard by a comfortably close margin of three points, enabling the Hill enterprise to win its bets. Although Sweeney swore that he did not participate in the effort to make the game close, Hill, who met him after the game, thought that he had and promised to send money through Kuhn. (T 939) When Kuhn finally collected $2,000 from a Western Union office, Sweeney accepted a $500 payment. (T 940)

The next relevant conversation that Sweeney had with Kuhn dealt with the UCLA game, a game which UCLA was heavily favored to win. (T 941) Before the game, Kuhn asked Sweeney to help lose the game by more than the 15-point spread. (T 941-42) Although Boston did ultimately lose the game by more than 20 points, Sweeney claimed that he had nothing to do with it. (T 942)

The first game of 1979 was played on January 10th against Rhode Island. (T 946) Here again, with Rhode Island favored, Kuhn asked Sweeney to help lose the game by more than the point spread. (*Id.*) Sweeney again refused. Game after game Kuhn unhesitatingly spoke of the point shaving scheme despite Sweeney's unwillingness to participate. Just before the February 3, 1979 Boston College-Fordham game, Kuhn asked Sweeney to meet with Rocco Perla. (T 949-50) Kuhn wanted Sweeney to meet Perla because even though Sweeney wasn't cooperating, the gamblers thought that he was a participant. (T 949) Rocco Perla's February meeting with Sweeney was simply a pep talk about past and future performances for the gamblers. (T 950-51) Rocco Perla also said that he would talk later that night to player Ernie Cobb. (T 951) Once again, Sweeney purported to go along even though he intended not to. (T 952) Despite Sweeney's non-participation, however, Boston College won the Fordham game by less than the point spread, allowing the gamblers to win their bets. This time, however, Sweeney refused to take money from Kuhn. (T 954)

Three days later Boston College played St. John's, another team which was heavily favored to win. Before the game, Kuhn told Sweeney that he had been told by Anthony Perla that the Pittsburgh and New York people wanted to bet on St. John's and would be successful only if Boston lost by more than nine points. (T 955) Again, Sweeney did not participate and the team lost by nine points causing a "push" with no one winning or losing. (T 956)

As Kuhn described it to Sweeney, the February 10, 1979 game between Boston College and Holy Cross would be the "great finale." (T 958) Since the game was televised to a wide audience, it was one which would surely attract large bets. While at Kuhn's apartment, Sweeney spoke directly to Anthony Perla on the telephone. Perla told Sweeney that since the stakes were

so high, each player who would participate in point shaving would receive $10,000 if the bets were successful. (T 958) They were not. Sweeney, according to his testimony, became so unnerved by the pressure placed upon him that he intentionally "fouled out." (T 962) Kuhn later told Sweeney that Perla was "irate" and that the bettors had lost an extraordinary sum of money on the game. (T 965)

Another Boston College player, Arthur Joseph Beaulieu, gave testimony about the scheme. Beaulieu recalled a conversation with Kuhn before the Boston College-Harvard game on December 16, 1978. (T 1277) Kuhn told Beaulieu that he had friends who would pay money to have the outcome of the game affected. (T 1278) The reward would be money and cocaine. (T 1279-80) Beaulieu told Kuhn, however, that he didn't want to have anything to do with the proposal. (*Id.*)

Kuhn was further implicated by admissions that he made to Barbara Reed, who at the time was his live-in girlfriend. (T 1159-60) Kuhn told Reed about meeting "big gamblers" from New York. (T 1166) Reed also described very loose spending by Kuhn, which Kuhn attributed to "the betting thing." (T 1170) Finally, after the Harvard game, Kuhn expressly admitted that he was shaving points for Henry Hill and his group including "a man in New York." (T 1176-77) As if that were not all, Kuhn confessed his participation in the point shaving scheme upon his initial interview with James Byron, an FBI agent. (T 1679-80)

Another witness, Christine Siano, testified to an admission made to her by Anthony Perla. Siano, a school friend of Perla, confronted Perla with an article in *Sports Illustrated* Magazine which exposed the point shaving scheme. According to Siano, Perla exclaimed " ... so I shaved a few games, it is no big deal ...." (T 1654)

2. The Case Against James Burke

As convincing as all this evidence was, it did absolutely nothing to implicate Burke. Sweeney did not know Burke, nor did he ever have any conversations with him. (T 972) Arthur Beaulieu did not say anything about Burke and Barbara Reed did not know him either. (T 1205) Indeed, Kuhn, who spoke to FBI agent Byron about the scheme for a half an hour in September of 1980, never mentioned Burke. (T 1692) In the end, then, it was only the testimony of Henry Hill which linked Burke to the scheme charged in this indictment. Although the government may be expected to contend, as it did at trial, that Hill's testimony was corroborated, it remains that Hill was the *sine qua non* of the government's case against Burke.

In a nutshell, Hill claimed that everything he did in connection with this scheme was done at the behest or instruction of Burke. Hill testified that when Mazzei and Anthony Perla first described the opportunity to corrupt Kuhn, he envisioned Burke's participation. (T 195-96) Hill's own testimony showed, however, that he, himself, was directly plugged into a network of bookmakers. Before allegedly speaking to Burke, Hill contacted Nick Barta, Martin Krugman and John Savino, all of whom were described by Hill as major bookmakers. (T 202-03)

On October 19, 1978, Hill, according to his uncorroborated testimony, spoke to Burke about the scheme. Burke, again according to Hill, said that he was interested and asked to meet with Paul Mazzei. (T 203-04) Burke then told Hill not to speak to anyone and that he would be in contact with the bookmakers, including Richard Perry, another major gambler. (T 205)

During the first week of November, 1978, Mazzei came to New York and met with Burke. (T 209) This meeting was described by a single witness, Henry Hill. Burke, who was described on this occasion as "enthused," said that he wanted to speak directly to Anthony Perla. (T 210)

Following this request, Hill arranged a meeting, on November 16th, with Burke, Perla and Mazzei at Robert's Lounge. (T 218) Prior to this meeting, Burke allegedly spoke to a number of bookmakers including Krugman, Barta, Savino, Perry, John Yarmosh and Milton Weckar. (T 213-14) Burke and Hill also spoke to a "major bookmaker" by the name of Ralph Atlas. (T 215-16) When Burke met Mazzei and Perla at Robert's Lounge on November 16th, Savino, Barta, Krugman and an individual named Peter Vario were present. (T 218) Once again, Hill gave an uncorroborated account of what took place. Anthony Perla "laid the whole scheme out to Jimmy" and several details were resolved. (T 219-20) The New York contingent would be responsible for the "bookmaking network" and paying the players. (*Id.*) Later that afternoon Hill, Peter Vario, Perla and Mazzei went to Aqueduct Racetrack where they met with Richard Perry who agreed to serve as the liaison with the amorphous "network of bookmakers," betting approximately $20,000 on each game chosen. (T 238-39)

After describing the embryonic phase of the conspiracy, Hill testified to the ups and downs of the Boston College games and the bets placed on them. The only major difference between Sweeney's account and Hill's account is that Hill implicated Burke. Burke engineered the payment to the players (T 256-57), obtained the line on the games (T 258-59), and supervised the betting. (T 273-74) In fact, Hill described himself as so closely aligned to Burke that at one point during the season, he traveled to Florida, where Burke was vacationing, in order to confer with his mentor. (T 283, *et. seq.*) Hill's trip to Florida provides a perfect example of how the government "corroborated" his testimony. Hill testified that he drove to Miami in January of 1979 with his girlfriend, his sister-in-law and his daughter, Gail. (T 284) In order to bolster Hill's account of his conspiratorial meeting with Burke, the government called Joseph Dragonie, an assistant principal of the

school attended by Hill's daughter. (T 1326) School records showed that Gail Hill was absent from January 8th to January 18, 1979 and that her absence was excused, in a note from her mother, by a trip to Florida. (T 1336)[5]

But there was an even more interesting dimension to this Florida trip. Hill testified that after meeting with Burke he returned to New York on the Autotrain on January 17th. (T 289) On that day, Boston College played Connecticut and Hill didn't want to lose the opportunity to bet on the game. (*Id.*) While en route, according to Hill, he called Mazzei and Anthony Perla to find out the line and then called "the bookmakers" to place his bet.

> Q. Where did you make the telephone call from?
>
> A. Along the road. Even when the train stopped at one point, when I got on the autotrain, I jumped off and I got on the phone and called another bookmaker that I couldn't reach in Florida.
>
> Q. Did you get back on the train?
>
> A. Yes, of course. (T 289-90)

On the defense case, Burke called Robert McManaway, the administrative manager for Autotrain. (T 1815) In 1979 the Autotrain was scheduled to leave at 4:00 o'clock in the afternoon, but the train consistently left 20 minutes to a half hour late every day. (T 1818)[6] The first stop the train made was at a freight yard in Jacksonville, Florida. At that stop the nearest public telephone is three miles away and, in any event,

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[5] This type of "corroboration" brings to mind the innkeeper who claims that George Washington slept at his inn and, to bolster his claim, shows the bed.

[6] At the present time, Autotrain is in bankruptcy. (T1816)

passengers were not allowed to disembark. (T 1819-20) The next stop on the train was in Savannah, Georgia where the train was scheduled to arrive at 9:15, but ordinarily would arrive closer to 10:00 p.m. (T 1821) Thus, Hill's categorical assertion that he got off the train to place his bet on the Connecticut game was shown to be physically impossible.

The remaining corroborative evidence supplied by the government in its case against Burke had very limited worth. In the main, it consisted of telephone records which showed that various persons alleged to be conspirators in this case called and received calls from two telephones located in Burke's Queens home. The telephone calls are summarized in a schedule which was admitted as Government's Exhibit 19. It was shown by this evidence that contact was made between Burke's telephone and many of the bookmakers described in Hill's testimony. (Government Exhibit 19) These records also showed telephone contact between Burke's phone (or the phone registered to his daughter, Catherine) and Paul Mazzei or persons related to him. The government also isolated for the jury's attention a call from the Burke home to the Logan Hilton Inn where Hill, Mazzei and Anthony Perla were meeting on November 17, 1978.

The limited value of this telephone proof was conceded by the government at trial. (T 2236-37) There was no evidence, independent of Hill's testimony, that Burke himself had made or received these calls. In fact, it was established by both cross-examination of Hill and witnesses called for the defense, that Hill was a frequent visitor to the Burke home, that during this period he was helping Burke renovate his kitchen and that he freely used the phones in Burke's home. William Bored, a contractor who performed work at the Burke house in January, 1979, and who knew Henry Hill, said that during January and February he would frequently see Hill at Burke's home using the phones, including the phone in a bedroom. (T 329, 681, 1974-75)

Joseph Razzano, a friend of the Burke family, explained that it was he who placed the call to the Logan Hilton Inn in November of 1978 and that Burke was not home at the time. (T 1787-89) Razzano's testimony was corroborated by James Grant, Burke's brother-in-law, who was present on November 17th when the telephone call was made. (T 1808-10) Other witnesses, including Howard Schuchman, Burke's employer, and John Yarmosh were called to dispute specific allegations made by Hill. Yarmosh, who admitted to bookmaking, testified that he never discussed nor acted upon a point shaving scheme with either Hill or Burke. (T 1903-04)

3. The Issue Regarding the Sports Illustrated Subpoena

Henry Hill's testimony in this case was by no means his first public discussion of the matter. Indeed, Hill co-authored an article with *Sports Illustrated* Magazine reporter Douglas Looney in the February 16, 1981 issue of *Sports Illustrated* entitled "How I Put The Fix In." This article presented a radically different account of the Boston College scandal. Hill, described by a *Sports Illustrated* caption as "a government informer seeking immunity in this and other cases," *described himself as the mastermind of the scheme and relegated Burke to only a peripheral role as a "business partner."* Further, the article flatly contradicted Hill's grand jury testimony on the details of the scheme. Specifically, Hill's article claimed that he had fixed nine games. Yet, his grand jury testimony only alluded to six. Indeed, one of those six games that Hill testified about in the grand jury was not even mentioned in the article.

On the basis of this clear discrepancy between Hill's two accounts of the Boston College affair, counsel for Burke issued a subpoena *ad testificandum* to Looney and subpoenas *duces tecum* to Looney, the President, or any duly authorized representative of Time, Inc.,

and the managing editor of *Sports Illustrated* Magazine. The subpoenas *duces tecum* called for the production at trial of:

(i) Any and all contracts, agreements, memoranda of understanding or other document, however it may be styled, entered into between Time, Incorporated, or any of its subsidiary or affiliated corporations, companies, partnerships or other legal entities, and Henry Hill and/or Robert Simels (Hill's attorney).

(ii) Any and all notes, memoranda, reports, or other documentation (regardless of form, type or internal description), that concerns, encompasses, or is reflective of the nature, substance or fact of any interview of Henry Hill, Judith Wicks, James D. Sweeney, and/or Ernie Cobb pertaining to an article published in the February 16, 1981 issue of *Sports Illustrated* entitled, "How I Put The Fix In" by Henry Hill with Douglas S. Looney.

(iii) Any and all audio tape recordings and transcripts of audio tape recordings pertaining to interviews of, or conversations with, Henry Hill and/or Judith Wicks, which interviews or conversations relate in any manner whatsoever to the magazine article referred to in item (ii) above.

(iv) Any and all "gallies," page proofs, drafts of story, "check or" notes (or other document relating in any way to efforts to *verify or confirm any aspect of information or material furnished by Henry Hill*), all as pertain to the magazine article referred to in item (ii) above.

(v) Copies of any and all checks, money orders, bank drafts, or other financial or security instruments made payable to Henry Hill (or anyone designated by him), as payment for information relating to, or for Henry Hill's participation in the preparation or authorship of the magazine article referred to in item (ii) above.

Time, Inc.'s response to the subpoenas claimed that Burke's attorneys had embarked upon a "fishing expedition"; that they sought to rummage; that they

were turning reporters into defense "investigators"; and that forced compliance with the subpoenas would entail revealing internal editorial processes and therefore chill the exercise of First Amendment rights.

The trial court's response was to quash the subpoenas in their entirety until Henry Hill actually testified. Reasoning that Burke had the burden of showing both a compelling need for the material at trial and that the materials requested were not available from any other source before he could overcome "the press' *qualified* First Amendment privilege to maintain the integrity of its news-gathering and editorial functions" (T^1 27),[7] the court held that such a showing could not be made until Hill testified at trial. "It is only at such point," said the court, "that the substance of Hill's testimony will truly be known and capable of evaluation to determine the existence of possible inconsistencies which might exist." (T^1 28)

These "possible inconsistencies" soon became a reality once the cross-examination of Hill began. In essence, Hill disavowed the entire article and characterized those statements attributed to him in the article as lies by Mr. Looney. (*See, e.g.*, T 360-61 and 371) With this testimony in hand, testimony which was extraordinarily probative of Hill's credibility, counsel for Burke sought and received from the trial court an order requiring counsel for Time, Inc. to show cause why the materials called for in the original subpoenas *duces tecum* should not be produced for *in camera* inspection by the court.

Time, Inc. was, however, never required to make this showing. Instead the trial court, without hearing from counsel on the issue, ruled that the subpoenas

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[7] The notation "T^1" refers to the transcript of a September 22, 1981 argument before Judge Bramwell.

would be enforced only to the extent of requiring Looney to testify.[8] The court stated:

> The only thing we have before us is an article that appeared in Sports Illustrated and was printed and circulated to a vast number of its readers, a vast number.
>
> Now, in the cross-examination of Mr. Hill by Mr. Coiro there are statements in that particular article which the writer attributes to Mr. Hill, and which Mr. Hill either denied or he said the writer made up.
>
> The only issue is credibility.
>
> Now, after I have heard what I have heard in the case, and consistent with what the court's position has been, I would permit Mr. Looney to be subpoenaed on the basis of the credibility of Mr. Hill based on the article alone, without going further than the article.
>
> In other words, Mr. Looney would be shown the article and be asked did he say this, and whatever his answer is, is the answer to that.
>
> I would permit that to be done. I do not see any need for the court to require him to produce his records, because the only issue here is credibility. And if he says that Mr. Hill said that, then that resolves what the issue may be.

(T^2 8-9)[9] This ruling was excepted to by counsel. (T^2 17)

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[8] Presumably, the trial court was still relying upon its prior decision that the defendant had the burden of showing both compelling need and lack of alternative sources. Yet the court did not even express interest in hearing counsel for Burke on this issue before ruling.

[9] The notation "T^2" refers to the transcript of an October 30, 1981 argument before Judge Bramwell.

The Court of Appeals Opinion

On appeal, petitioner challenged the trial court's quashing of his subpoenas *duces tecum* as being violative of his Sixth Amendment right to compulsory process. Relying upon this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), petitioner claimed that Time, Inc. had no First Amendment privilege upon which it was entitled to rely.

In response, the Court of Appeals held that, even in a criminal case, journalists have a qualified privilege to refuse to produce confidential information. In essence, the court adopted the test it had approved for use in civil cases:

> The law in this circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from available sources.

(Appendix, p. 9a, quoting *In Re Petroleum Products Anti-Trust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982)).

In response to the argument that, in light of *Branzburg, supra*, a different approach must govern in a criminal case, the court stated:

> We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest and confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless the standard of review should remain the same. Indeed, the important social interests in the free flow of

> information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing.

(Appendix, p. 10a)

Reasons for Granting the Writ

Petitioner contends that the Court of Appeals' conclusion that the press has a qualified First Amendment privilege to withhold evidence in a criminal case was erroneous. Where, as here, a criminal defendant seeks evidence important to his defense, the press has no First Amendment privilege upon which it may rely in refusing to supply subpoenaed evidence.

Primary support for this claim can be found in *Branzburg v. Hayes*, 408 U.S. 665 (1972), where this Court held that a newspaper reporter did not possess a First Amendment privilege entitling him to refuse to reveal confidential information to a grand jury. As the Court stated:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. *We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.*

408 U.S. at 690. (Emphasis supplied)

In so holding, this Court rejected the argument

> that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to

> the detriment of the free flow of information protected by the First Amendment.

408 U.S. at 680. Instead, this Court found that "[c]itizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence." 408 U.S. at 682.

Branzburg's rejection of a First Amendment privilege in the grand jury setting is equally applicable in those situations where a criminal defendant seeks to obtain evidence relevant to his defense from the press. *United States v. Liddy*, 354 F.Supp. 208, 213 (D.C.D.C. 1972). Throughout the opinion in *Branzburg*, this Court made clear that its holding as to the absence of privilege covered evidence subpoenaed at criminal trials. For example:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and insuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation *or criminal trial.*

408 U.S. at 690-91. (Emphasis supplied) Similarly, in discussing the "frivolous" suggestion that the "First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws," this Court stated: "Neither [a reporter or his source] is immune, on First Amendment grounds, from testifying against the other, before the grand jury *or at a criminal trial.*" 408 U.S. at 691 (emphasis supplied); *see also*, 408 U.S. at 680, 686, 693.

Further, it must also be noted that the holding in *Branzburg* was substantially grounded upon the Court's recognition that the grand jury stands as a buffer between the citizen and the state, insuring that there is a sufficient basis for prosecution. In this regard, this Court cited *Wood v. Georgia*, 370 U.S. 375, 390 (1962):

> Historically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accusor and the accused ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

408 U.S. at 687. Thus, it cannot be argued that *Branzburg* was directed only toward enhancing the role of the grand jury as a prosecutorial tool. Rather, the disallowance of a "newsman's privilege" was equally founded upon a concern for the constitutional rights of potential defendants. Surely, then, it would be absurd to suggest that *Branzburg* applies only to grand jury subpoenas.

The underlying theme of *Branzburg* is that a citizen's right to fair and constitutional treatment by the criminal justice system is not outweighed by speculative "[e]stimates of the inhibiting effect of ... subpoenas on the willingness of informants to make disclosures to newsmen ...." 408 U.S. at 693-94. Indeed, "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153, 175 (1979) (footnote omitted). This policy is most relevant in those circumstances where a criminal defendant's Fifth and Sixth Amendment rights are involved. Thus, in *United States v. Nixon*, 418 U.S. 683 (1974), this Court acknowledged the existence of a constitutionally-based executive privilege to withhold confidential Presidential communications but ruled that the privilege

must give way to "the constitutional need for production of relevant evidence in a criminal proceeding ...." 418 U.S. at 713.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

418 U.S. at 709; *cf. Davis v. Alaska*, 415 U.S. 308 (1974) (defendant's constitutional right to confrontation outweighs state provisions protecting the anonymity of juvenile offenders.); *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) ("Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused ... the [government's] privilege [of non-disclosure] must give way.")

This analysis of *Branzburg* is firmly supported by case law. In *United States v. Liddy*, 354 F.Supp. 208 (D.D.C. 1972), the court was presented with a situation almost identical to the one here and sided with the argument raised now by petitioner. At issue in *Liddy* were four newspaper articles, purporting to tell the inside story of Watergate, that were co-authored by Alfred C. Baldwin, who had been a grand jury witness in the case and was expected to be a key government witness at trial. Claiming that any documents relating to these articles would be crucial to the preparation of the defense, subpoenas *duces tecum* were issued to

the Washington Bureau Chief of the *Los Angeles Times* and two *Times'* staff writers. The respondents then moved to quash. Noting that "[t]he question arising here is whether some First Amendment privilege sanctions a newspaper's refusal to produce evidentiary material in its possession relevant to a criminal trial," 354 F.Supp. at 211, the court denied the motion. Specifically, the court interpreted *Branzburg* as requiring enforcement of the subpoenas.

> It is conceded that the specific question facing the Supreme Court in *Branzburg* concerned grand jury investigations and the confidentiality of news sources as opposed to the confidentiality of information in criminal trials. *Nevertheless, the principles there enunciated by the Court are of sufficient breadth to be controlling here.*

354 F.Supp. at 213. (Emphasis supplied)

In *In Re Farber,* 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom, New York Times Co. v. New Jersey,* 439 U.S. 997 (1978), the Supreme Court of New Jersey upheld judgments of contempt against both the *New York Times* and Myron Farber, one of its reporters, for failure to comply with two subpoenas *duces tecum* directing production of documents relating to Farber's investigative reporting on alleged criminal activities by defendant Dr. Mario Jascalevich. Articles written by Farber were said to have contributed largely to the defendant's indictment and the trial court had ordered production of the documents for *in camera* inspection to determine whether they should be turned over to the defense. The basis for the court's upholding of the contempt judgment was its view that *Branzburg* required compliance with the court order.

> Thus we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and

> balancing has been done by a higher court. Our conclusion that appellants cannot derive the protections they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here. It follows that the obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury.

394 A.2d at 334; *see, State of Vermont v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974).

In *In Re Roche*, 411 N.E.2d 466 (1980), a lower court judge had sought to depose a reporter in preparation for a hearing into charges of misconduct by the judge. The reporter, who had broadcast many of these charges in an investigative report, refused to comply with the subpoenas and was held in contempt. In finding the contempt citation to be valid, the court rejected the view that the reporter could in any way rely upon a First Amendment privilege. Central to this holding was the recognition that "the United States Supreme Court has established that the First Amendment does not 'grant newsmen a testimonial privilege that other citizens do not enjoy'." 411 N.E.2d at 472 (citation omitted)

> On the basis of the record before us, we do not believe that the First Amendment creates at the level of constitutional doctrine an exception to the "long standing principle that 'the public ... has a right to every man's evidence'." ... While the question before us involves Roche's testimony at a deposition in a civil matter rather than his appearance before a grand jury in a criminal case, we cannot discern a constitutionally significant difference between the public interest in securing the accurate resolutions of charges of judicial misconduct and the corresponding interest in securing accurate criminal convictions.

411 N.E.2d at 473. (Citations omitted)

Last, in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, 431, *cert. denied*, 419 U.S. 966 (1974), the court, relying upon *Branzburg* and *Liddy,* stated:

> We are of opinion that when there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal defense, or to proof of the defense asserted by the defendant, or to a reduction in a classification or gradation of the offense charged, or to a mitigation of the penalty attached, the defendant's need to acquire such information is essential to a fair trial; when such other information is not otherwise available, the defendant has a due process *right* to compel disclosure of such information and the identity of the source; and any *privilege* of confidentiality claimed by the newsman must, upon pain of contempt, yield to that right.

In response to this analysis of *Branzburg*, there are two possible but meritless arguments that can be made. First, it might be urged that *Branzburg* applies only to the issue of whether a reporter may be forced to testify and not to the availability of information contained in files or recordings of interviews. Clearly, this is an absurd distinction, one which was rejected in *United States v. Liddy, supra.*

> If then, the First Amendment right to gather news affords no absolute privilege against the compelled revelation of news sources, this Court is hard put to understand how it may find such a privilege against the disclosure of confidential information relevant to a criminal trial. The Court's reasoning is this: despite the fact that the newsman's ability to gather news may be hampered if he cannot guarantee confidentiality, the Supreme Court has said that the right to

> gather news does not give him a First Amendment privilege to resist a demand by proper authority that he divulge his source's identity. What makes the need to withhold confidential *information* more compelling and therefore more deserving of constitutional protection?

354 F.Supp. at 214.

Second, and more important, is an argument which relies upon a section of Justice Powell's concurring opinion in *Branzburg*:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional ways of adjudicating such questions.

408 U.S. at 710. The Third Circuit, relying upon this passage, has fashioned a rule which upholds a reporter's privilege unless it can be demonstrated that (1) an effort has been made to obtain the information from other sources, (2) the only access to the information sought is through the journalist and his sources, and (3) the information sought is crucial to the claim. *Riley v. City of Chester*, 612 F.2d 708 (3rd Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981);[10] *United States v. Criden*, 633 F.2d 346 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Cuthbertson*, 651 F.2d 189 (3rd Cir.), *cert. denied*, 454 U.S. 1056 (1981).

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[10] The Court of Appeals in this case cited *Cuthbertson* with approval (Appendix, p. 12a).

Quite simply, these decisions quote Justice Powell out of context and seriously distort this Court's holding in *Branzburg*. While the Court there did recognize the existence of a qualified First Amendment privilege, it made clear that the balancing of this privilege against a grand jury's or criminal defendant's need for information or testimony should be undertaken only in very limited circumstances.

> Finally as we have earlier indicated, news gathering is not without its First Amendment protections, *and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.* Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand Juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

408 U.S. at 707-08. (Emphasis supplied) This passage makes it clear beyond peradventure that there is a First Amendment privilege sanctioning non-compliance with a grand jury's or a defendant's subpoenas only when the subpoena is issued in a bad-faith effort to "disrupt a reporter's relationship with his news sources ...." In the present case, as evidenced by the trial court's decision to compel Douglas Looney to testify, the petitioner's subpoenas cannot be so characterized.

Further, Justice White's plurality opinion in *Branzburg* specifically rejected a case-by-case approach to the issue raised by defendant's subpoenas:

> The privilege claimed here [by the press] is conditional, not absolute; given the suggested preliminary showings and compelling need, the

> reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.

408 U.S. at 702. (Footnote omitted)

Justice Powell's concurrence does not contradict this view of *Branzburg*. Indeed, if one reads that portion of his opinion which immediately precedes his oft-quoted passage, it becomes obvious that Justice Powell was simply reiterating the majority view.

> *As indicated in the concluding portion of the opinion, the court states that no harassment of newsmen will be tolerated.* If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash ....

408 U.S. at 709-10. (Emphasis supplied)

Support for this analysis can be found in *In Re Farber, supra*, where the court rejected the claim that Justice Powell's concurrence allowed for a newsman's privilege in cases such as the present one.

> We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White. But even if it did, it would not matter for present purposes. *The important and conclusive point is that five members of the Court have all reached the conclusion that the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in doing so he may divulge confidential sources.* The particular path that any justice may have followed becomes unimportant when once it is seen that the majority have reached the same destination.

394 A.2d at 334. (Emphasis supplied)

Similarly, in *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 (1977), the Supreme Court of Idaho stated:

> Mr. Justice Powell filed a special concurring opinion [in *Branzburg*] and it is argued that such detracts from the conclusiveness of the plurality opinion. *We do not agree ... [W]e read it only to state that if an "investigation is not being conducted in good faith [the newsman] is not without remedy."*

562 P.2d at 793. (Emphasis supplied)

Thus it can be seen that *Branzburg* required the trial court to deny Time, Inc.'s motion to quash the subpoenas. The petitioner had an unquestionably good-faith basis for requesting the documents subpoenaed — the article on its face contradicted the trial testimony — and Time, Inc., accordingly, had no First Amendment privilege upon which it could legitimately rely upon in refusing compliance. The trial court, therefore, should never have attempted to balance non-existent conflicting considerations, and the Court of Appeals should not have affirmed petitioner's conviction. As the court stated in *Farber*: "The weighing and balancing has been done by a higher court." 394 A.2d at 334.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: May 3, 1983

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 26, 27, 28, 29 — August Term, 1982
(Argued September 20, 1982 Decided January 28, 1983)
Docket Nos. 82-1028, 82-1030
82-1032, 82-1056

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES BURKE, ANTHONY PERLA,
ROCCO PERLA, and RICHARD KUHN,

Defendants-Appellants.

Before:

LUMBARD, MESKILL and CARDAMONE,

Circuit Judges.

Appeal from the judgment of the United States District Court for the Eastern District of New York, Bramwell, *J.*, convicting the appellants of conspiracy to violate the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1976 & Supp. V 1981), conspiracy to commit sports bribery, 18 U.S.C. § 224 (1976), and interstate travel with the intent to commit bribery, 18 U.S.C. § 1952 (1976).

Affirmed.

GERALD L. SHARGEL, New York, New York, *for Defendant-Appellant Burke.*

JAMES K. O'MALLEY, Pittsburgh, Pennsylvania, *for Defendants-Appellants Rocco and Anthony Perla.*

GARY B. ZIMMERMAN, Pittsburgh, Pennsylvania, *for Defendant-Appellant Kuhn.*

EDWARD A. McDONALD, Attorney-in-Charge, U.S. Department of Justice, Organized Crime Strike Force, Eastern District of New York, Brooklyn, New York (Edward R. Korman, United States Attorney, Eastern District of New York, Lawrence H. Sharf, Special Counsel, Eastern District of New York, Brooklyn, New York of counsel), *for Appellee U.S.A.*

James C. Goodale, John G. Koeltl, Gary W. Kubek, Debevoise & Plimpton, New York, New York, *for Amicus Curiae Time, Incorporated.*

MESKILL, *Circuit Judge*:

The defendants appeal from the judgment of the United States District Court for the Eastern District of New York, Bramwell, *J.*, convicting them, after a four week jury trial, on charges of conspiracy to violate the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1976 & Supp. V 1981) (RICO), conspiracy to commit sports bribery, 18 U.S.C. § 224 (1976), and interstate travel with the intent to commit bribery, 18 U.S.C. § 1952 (1976). They challenge several rulings made by the trial court and ask this Court to reverse their convictions.

The judgment of the district court is affirmed.

Appendix A - Opinion of United States Court of Appeals

Background

The appellants' convictions arise from their participation in the Boston College (B.C.) basketball "point shaving scandal."[1] The evidence presented at trial, although somewhat sketchy, revealed that the point shaving scheme was born in Pittsburgh during the summer months of 1978 and was the brainchild of Rocco Perla and his brother Anthony (Tony). The Perla brothers were small-time gamblers with big-time ideas who viewed the 1978-79 B.C. basketball season as a perfect opportunity to implement these ideas. Their optimism was fueled by the prospect that they might recruit Richard Kuhn to join the scheme. Kuhn, a high school friend of Rocco Perla, was entering his senior year at B.C. and was expected to be a key member of the 1978-79 B.C. basketball team.

The Perlas proposed a simple scheme. They would select, in concert with Kuhn, certain basketball games where the projected point spread separating B.C. from its opponents was expected to be significant.[2] Kuhn would

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[1] This scandal reached national prominence when Sports Illustrated (SI), in its February 16, 1981 issue, published an article by Henry Hill, in collaboration with Douglas Looney, entitled *How I Put The Fix In*. This article purported to be Henry Hill's first-hand account of the point shaving scheme and implicated the appellants in this scandal.

[2] Much of the defendants' trial was devoted to an explanation of the practical operation and nuances of professional gambling. Fundamentally, the process begins when participating bookmakers agree to establish a "line" on an upcoming sporting event. Bookmakers create this "line" by determining, on the basis of prior records, injuries, home field advantage and other pertinent factors, which team should be favored to win the upcoming game. The bookmaker then must establish the so-called "point spread." If the teams are fairly even in the competitive sense, the point spread will be low. Thus, for example, if teams A and B are relatively equal, the better team generally would be favored to win by a small margin, perhaps 1-3 points. Conversely, if one team is far superior, the point spread would be much larger. To prevail, the gambler must pick the team that will beat the point spread. Hence, if Team A is favored by 5 points, the gambler who bets on that team wins if it beats Team B by more than five points. The bettor who wagers money on Team B will win if that team wins the game or even if it loses by less than 5 points.

be responsible for ensuring, by his play on the court, that B.C. fell short of the point spread. Thus, for example, if participating bookmakers determined B.C. to be an eight-point favorite in a particular game, Kuhn would be paid his bonus, usually $2,500, if B.C. won by less than eight points. Kuhn agreed to participate in this scheme.

Rocco and his brother Tony then mobilized a betting syndicate to maximize their potential gain from this illegal operation. They contacted a local friend, Paul Mazzei, who was known to have influence within major New York gambling circles. Mazzei in turn contacted Henry Hill, a reputed underworld figure from New York who had befriended Mazzei while both men were serving sentences in a federal penitentiary. Mazzei and the Perlas were particularly hopeful that Hill would enlist the support of his reputed underworld "Boss," defendant James Burke, to ensure protection for their enterprise in the event that the bookmakers discovered they were being swindled. Hill and Burke were brought into the scheme.

On November 16, 1978, Burke instructed Hill, Mazzei and Tony Perla to meet in Boston with Kuhn and any other member of the B.C. team interested in participating in their scheme. Hill, Mazzei and Tony Perla flew to Logan Airport in Boston and, after discussing their strategy with Kuhn, the defendants agreed that the upcoming Providence game would be an appropriate test for their scheme. Hill then paid Kuhn several hundred dollars good-faith money and Mazzei furnished him with some cocaine to seal the conspiracy.

The Providence game was played on December 6, 1978 and Boston College was favored to win by six to seven points. Kuhn was thus expected to keep the score below the six to seven point margin. The test run for the scheme proved unsuccessful, however, when B.C. established an early lead and ultimately won the game

by nineteen points. Apparently enraged by their gambling loss, the appellants decided to recruit additional B.C. players to enhance their control over the outcome of the games. They approached Ernie Cobb, the leading scorer on the team, and Joseph Beaulieu, who shared the center position with Kuhn. Cobb agreed to cooperate, while Beaulieu rejected this offer.

The December 16 Harvard game was chosen as the second test for the scheme. B.C. was favored by twelve points, but won the game by only a three-point margin, 86 to 83. The bettors were very happy with this result and Kuhn was paid $2,500 for his efforts. The scheme continued to work successfully in the December 23 U.C.L.A. game,[3] where U.C.L.A., a fifteen to eighteen-point favorite, won the game by twenty-two points.

Suspecting that some bookmakers might be getting wise to the scheme, the defendants temporarily revised their strategy after the U.C.L.A. game. To allay any suspicions of foul play, the defendants decided to bet on B.C. to win by *more* that the point spread in a game that they were confident B.C. would win handily. The conspirators chose the January 17 University of Connecticut (UCONN) game to implement this plan. Their strategy was effective; B.C., a two to three point favorite, beat UCONN by a margin greater than the point spread.[4]

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[3] The U.C.L.A. game was the first game that the players agreed to lose intentionally.

[4] The trial testimony relating to the UCONN game highlights the inconsistencies between Henry Hill's testimony at trial and his representations in the SI article. Hill maintained at trial that the game was played on January 17, that B.C. was favored by two or three points and that B.C. ultimately won by a margin greater than the point spread. The SI article indicates that the game was played on January 27, that B.C. was a five to six point favorite and that B.C. won the game by one point, 78-77. We are, however, bound by the evidence presented at trial and our discussion of the facts reflects this limitation.

In early February, B.C. was scheduled to play two New York teams, Fordham and St. John's. The defendants decided that these games presented especially good opportunities because New York bookmakers generally accepted large bets for New York teams. They reintroduced the original strategy and it proved successful for the February 3 Fordham game when B.C., a thirteen-point favorite, won by seven points. The February 6 St. John's game was a "push": the bettors neither won nor lost when St. John's prevailed by the exact betting margin established by participating bookmakers.

Confident from their recent success, the defendants viewed the February 10 Holy Cross game as an opportunity to reap the full benefits of their scheme. They were aware that bookmakers generally accepted large bets on this game because B.C. and Holy Cross were traditional rivals and also because the game was being televised nationwide. Holy Cross was favored to win and, consistent with the scheme, the defendants bet on Holy Cross to win by a margin greater than the point spread. Holy Cross ultimately won by only two points, however, and the defendants lost a substantial amount of money. The scheme thus concluded on an unsuccessful note.

The criminal conspiracy unraveled when Henry Hill was indicted by state authorities on drug conspiracy charges and subsequently was implicated in the Lufthansa robbery at Kennedy Airport in New York.[5] While being questioned on these charges, Hill revealed that he had recently participated in a point shaving scheme involving the B.C. basketball team and various underworld figures. Hill offered to relate the full story of the swindle if federal officials would guarantee him full

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[5] On Friday, December 8, 1978, one of the largest armed robberies in United States history occurred at the Lufthansa cargo warehouse in Kennedy Airport. The criminals involved in that robbery absconded with $5 million in cash and $1 million in jewelry. *See generally United States v. Werner*, 620 F.2d 922, 924-27 (2d Cir. 1980).

immunity and would agree to intercede on his behalf to convince state officials to drop the drug charges pending in state court. The grand jury indicted Burke, Mazzei, Kuhn, Rocco Perla and Tony Perla on the basis of testimony given by Hill. Hill was indicted as a co-conspirator, but was not named as a defendant.

At trial, the government's case consisted principally of the testimony of Henry Hill and three other witnesses, James Sweeney and Joseph Beaulieu, both B.C. players, and Barbara Reed, a 23-year-old nurse who lived with Kuhn during the 1978-79 B.C. season. The government also introduced two confessions, one made by Kuhn and the other by Tony Perla. Finally, the government presented telephone records showing evidence of extensive communications between the conspirators during the 1978-79 season, and records provided by Western Union and various hotels which further corroborated government testimony.

Each appellant was convicted, after a four week jury trial, on charges of RICO conspiracy, 18 U.S.C. § 1962(d) (1976 & Supp. V 1981), conspiracy to commit sports bribery, 18 U.S.C. § 224 (1976), and interstate travel with the intent to commit bribery, 18 U.S.C. § 1952 (1976). Judge Bramwell sentenced defendant Burke to a twenty year prison term. Appellants Kuhn, Mazzei and Tony Perla were sentenced to ten year prison terms on the RICO count, and concurrent five year terms on the two remaining counts. The court imposed a four year jail term on Rocco Perla. *See* 18 U.S.C. § 1963 (1976).[6]

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[6] 18 U.S.C. § provides in part:

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Appellant Mazzei decided to pursue his appeal separate from his co-defendants. *See United States v. Mazzei*, Docket No. 82-1146, slip op. 1571 (2d Cir. Jan. 28, 1983).

Discussion

The appellants point to eight rulings made by the trial court to support their claims of judicial error. Only two of these rulings merit extended discussion. We will deal with the other claims briefly.

A. Propriety of Quashing Subpoena

On February 16, 1981, Sports Illustrated (SI) published an article written by Henry Hill, in collaboration with Douglas Looney, entitled *How I Put The Fix In.* This article purported to be Hill's first-hand account of the point shaving scheme. Prior to trial, counsel for appellant Burke served a subpoena on Time, Incorporated,[7] the parent company of SI, seeking production of virtually every document and tape in the possession of SI that in any way related to the Looney article.

Time, Inc. moved to quash the subpoena pursuant to Fed. R. Crim. P. 17(c), relying on the First Amendment reporter's privilege and arguing that broad-ranging production of SI documents would be unreasonable and unnecessary. Judge Bramwell ordered the subpoena quashed prior to trial, but permitted the appellant leave to renew his request after Henry Hill had testified. The court explained that the decision whether to grant or deny disclosure of SI documents relating to the Looney article could be made more intelligently after Hill had testified to his recollections of the point shaving scheme.

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[7] Sports Illustrated is a subsidiary of Time, Inc. Burke also served subpoenas on reporter Looney and the Managing Editor of Sports Illustrated. For convenience, we refer to these entities collectively as "Time, Inc." Counsel for Time, Inc. submitted a brief as amicus curiae.

Burke renewed the subpoena request after Hill had concluded his testimony. Time, Inc. again moved to quash. Judge Bramwell granted the Rule 17(c) motion again, explaining that Burke had not satisfied his burden of showing that the subpoenaed documents were highly material and necessary to his case and not obtainable from other sources. The court noted that the only important evidentiary purpose served by production of these documents, *i.e.*, impeaching the credibility of Henry Hill, did not defeat Looney's First Amendment privilege. Hill had been thoroughly impeached at trial and thus the SI materials, even if relevant, would save a solely cumulative purpose. Judge Bramwell did order Looney to testify at trial, and he testified over the objection of Time, Inc., to any inconsistencies between Hill's in-court testimony and what he told Looney while preparing the SI article.

On appeal, Burke contends that Hill's testimony was the *sine qua non* of the government's case against him. He asserts that the court committed reversible error when it refused to review the SI documents *in camera* to determine if they would have substantially contradicted Hill's testimony and thus enhanced his chances for acquittal. When a litigant seeks to subpoena documents that have been prepared by a reporter in connection with a news story, this Circuit's standard of review, at least in civil cases, is well settled:

> The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. *Baker v. F & F Investment*, 470 F.2d 778, 783-85 (2d Cir. 1972), *cert. denied*,

411 U.S. 966, 93 S.Ct. 2147, 36 L.Ed.2d 686 (1973). *Accord, Zerilli v. Smith*, 656 F.2d 705, 713-15 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977).

In re Petroleum Products Antitrust Litigation, 680 F.2d 5, 7-8 (2d Cir. 1982) (per curiam). This demanding burden has been imposed by the courts to "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)." *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

We see no legally principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving party's need for probative evidence. To be sure, a criminal defendant has more at stake than a civil litigant and the evidentiary needs of a criminal defendant may weigh more heavily in the balance. Nevertheless, the standard of review should remain the same. Indeed, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing.

This Circuit has recognized, albeit implicitly, that the reporter's qualified privilege extends to both civil and criminal cases. In *United States v. Orsini*, we affirmed the district court's finding that:

> [T]here exists no absolute rule of privilege protecting newsmen from disclosure of confidential sources. Instead, what is required is a

> case by case evaluation and balancing of the legitimate competing interests of the newsman's claim to First Amendment protection from forced disclosure of his confidential sources, as against the defendant's claim to a fair trial which is guaranteed by the Sixth Amendment.

424 F.Supp. 229, 232 (E.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977). This view has been adopted by courts in other jurisdictions. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 146-47 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *United States v. Hubbard*, 493 F.Supp. 202, 205 (D.D.C. 1979); *see also Baker v. F & F Investment*, 470 F.2d at 784-85 (this Court observed that the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), recognized the need to balance First Amendment values even where a reporter is asked to testify before a grand jury). Having resolved this threshold issue, we proceed to balance the First Amendment interests of reporter Looney against the evidentiary needs of defendant Burke.

The *Petroleum Products* test requires the moving party to make a clear and specific showing that the subpoenaed documents are "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." 680 F.2d at 7. The Looney work papers may have been material and relevant inasmuch as they might have contradicted the trial testimony of Henry Hill. However, the appellant has completely failed to make the clear and specific showing that these documents were necessary or critical to the maintenance of his defense.[8]

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[8] The appellant has also failed to satisfy the third prong of the *Petroleum Products* test, *i.e.*, a clear and specific showing that the materials could not be obtained from another source. Attorney Robert Simels acted as counsel to Hill and was present during each interview

(Footnote continued on following page)

Counsel for Burke admitted at trial that the principal evidentiary purpose served by the Looney materials would be to impeach the credibility of Henry Hill. Judge Bramwell observed, however, that Hill had been impeached thoroughly during trial and thus any further impeachment evidence introduced against him would serve a solely cumulative purpose. The trial record fully supports the finding of the court that Hill's credibility was effectively attacked without resort to the SI documents. Specifically, Hill conceded that he was a career criminal who had committed many heinous crimes, including armed robbery, arson and hijacking. The witness admitted during direct examination that he had been convicted for his involvement in an extortion ring, and for loansharking, trafficking in heroin, cocaine and other illicit drugs. After counsel had exposed this litany of abuses, Judge Bramwell was prompted to remark:

> Now, with what's come out as to this witness, I see—I mean—it couldn't be worse as far as what would show as to a man in his condition.
>
> I mean he's done everything, every type of crime and situation.

Brief for Appellee at 26.

In addition to this wealth of impeachment evidence, Judge Bramwell also ordered that a redacted version of Hill's immunity agreement be read to the jury. Thus, the jury was aware that Hill, in an effort to curry favor with the government and thereby seal his immunity, might be

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(Footnote continued from preceding page)

between Hill and Looney, yet Burke has not moved to subpoena Simels' work papers or to compel Simels to testify to his recollections. The appellant offers the lame excuse that Simels will merely claim attorney-client privilege. Of course, no privilege could have been asserted regarding Hill's conversations with Looney overheard by Simels. In any event, this "prediction" does not insulate defense counsel from his duty to exhaust all reasonable alternatives. *Petroleum Products* demands that effort. *See* 680 F.2d at 8-9; *United States v. Cuthbertson*, 651 F.2d 189, 196 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981).

expected, regardless of his actual beliefs, to testify favorably for the prosecution. Finally, the court required Looney to testify at trial and defense counsel was able to expose inconsistencies between Hill's trial testimony and his representations to Looney. In light of this extensive impeachment evidence, the district court properly concluded that any information to be gleaned from the SI work papers would be merely cumulative and thus would not defeat Looney's First Amendment privilege.[9]

B. Instruction on Partial Verdict

While the jury was deliberating, it submitted the following note to Judge Bramwell:

> Do we have to reach a verdict for all five defendants; that is, can some be guilty of one or more counts, and the others be undecided?

Brief for Appellant Burke at 44. The court responded:

> Well, it's the desire of the Court and of all parties that if possible you return veridct [sic] on all five defendants if you can do so without violating your individual conscience.

Id.

The appellants argue that there is but one reasonable interpretation of this inquiry, namely, that the jury was considering the possibility of rendering a partial verdict and was unsure whether it was permitted to return such a

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[9] Our holding should not, however, be read as an indictment or criticism of *in camera* review. We encourage the courts to inspect potentially sensitive documents, especially in situations where, as here, the record reveals that the SI work papers were not sufficiently voluminous to render *in camera* review impracticable. We would have been troubled by the court's failure to undertake *in camera* review if there were any reasonable grounds to believe that inspection of the SI work papers would yield any probative evidence, other than cumulative impeachment evidence, to support the appellant's case. No such showing was made here.

verdict during the course of its deliberations. The appellants further contend that the district judge committed reversible error when he failed to instruct the jury under Fed. R. Crim. P. 31(b) that it could return a partial verdict at any time and reserve judgment on any remaining defendants or counts. Finally, the appellants maintain that their convictions should be reversed because the court's response to the jury inquiry was unduly coercive.

The appellants rely principally on this Court's decision in *United States v. DiLapi*, 651 F.2d 140 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3668 (U.S. Feb. 22, 1982), to support their Rule 31(b) claim. In *DiLapi*, the jury reported during deliberations that it had reached verdicts on some of the defendants, but did not express at that time a preference for reporting a partial verdict. Defense counsel asked the court to give a Rule 31(b) instruction, but this request was denied. The defendant objected to the court's ruling, arguing that the judge committed reversible error under Rule 31(b) when he failed to instruct the jury of its right to render a partial verdict.

On appeal, we reviewed the important function that the jury serves in the American criminal justice system. We then focused on the unique problems that juries confront in multiple defendant trials, particularly in fulfilling their constitutional duty to ensure that the evidence against each defendant be given separate and individual consideration. *See id.* at 146-47; *United States v. Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972). We explained that juries must be afforded "considerable latitude in determining for themselves the structure of the deliberative process that will best assure individual consideration of each defendant," including full discretion to decide when to report its verdict. *United States v. DiLapi*, 651 F.2d at 146. We cautioned, however, that since unrestricted jury discretion poses a serious threat to the integrity of the

judicial system, it is incumbent on the district judge to ensure that such discretion be exercised intelligently. Consistent with this duty to "inform," the district judge would be expected to give a Rule 31(b) instruction under appropriate circumstances:

> We think that juries should be neither encouraged nor discouraged to return a partial verdict, but should understand their options, especially when they have reached a stage in their deliberations at which they may well wish to report a partial verdict as to some counts or some defendants. In this case, the jury reported that it had reached a decision as to four of the defendants, was divided on the remaining two defendants, and awaited further instructions. At that point, particularly in view of counsel's request, an appropriate response by the trial judge should have included a neutral explanation of the jury's options either to report the verdicts reached, or to defer reporting of all verdicts until the conclusion of deliberations.

Id. at 147.

Upon concluding our review of the difficult procedural issues raised in multiple defendant trials, we ruled that the district judge's failure to give an instruction on partial verdicts did not violate rule 31(b):

> Plainly Rule 31(b) would be violated if a trial judge were to tell a jury it may not return a partial verdict or were to refuse a jury's request to return a partial verdict. But that is not what occurred here. Though the jury reported that it had reached verdicts as to some of the defendants, it did not indicate any preference for reporting a partial verdict. The request for return of a partial verdict came from counsel, and it was that request that Judge Bramwell refused.
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> . . . . .

> . . . However, the absence of such an explanation [on partial verdicts] did not deny the appellants any protected right in a case such as this where the jury neither attempted to return a partial verdict nor even asked if it could do so.

Id. at 146-47.

In this appeal, there are three plausible interpretations of the disputed jury request. The jury might have been inquiring whether it would ultimately be requested to reach a verdict as to each defendant. The request for instruction may have been intended as a preliminary inquiry to determine the various options. available to the jury during deliberations. Finally, the question may have been a reflection of the jury's wish to render a partial verdict. We do not propose to second-guess the trial court in difficult situations where, as here, the request for instruction is ambiguous. The district judge is able to observe first hand the tenor of the trial and is best suited to make informed judgments upon requests for instruction. We will not overturn those judgments under Rule 31(b) or *DiLapi* except upon a specific showing that the court refused to accept a partial verdict or specifically instructed the jury that it would not be permitted to return a partial verdict.

The *DiLapi* case presented a much closer question of reversible error under Rule 31(b). In *DiLapi*, the jury sent a note to the judge stating: "We have reached a verdict on four of the defendants. We are sharply and evenly split on the remaining two. We await further instruction from the Court." *Id.* at 144. Counsel then requested that the jury be given a Rule 31(b) instruction, but the judge refused. On the next day, the jury sent another note to the judge: "We have reached a unanimous decision on seven counts, but remain hopelessly deadlocked on the remaining five counts." *Id.* at 145. Counsel again suggested that the jury be given a Rule 31(b) instruction,

and the court rejected this request despite the clear possibility that the jury might have desired to render a partial verdict at that time.

In *DiLapi*, we questioned the district judge's failure to give a Rule 31(b) instruction under these circumstances, but nonetheless held that "the absence of such an explanation did not deny the appellants any protected right." *Id.* at 147. This conclusion applies with equal force to the present dispute. Rule 31(b) requires only that the district judge accept a partial verdict upon request, and refrain from instructing the jury that they may not return a partial verdict.

We also find that the appellants were not prejudiced, nor was the jury coerced by the court's instruction. *See generally United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978); *United States v. Rao*, 394 F.2d 354, 355 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968). Judge Bramwell's response to the jury's request for instruction was even-handed and did not "tend[]to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubts." *United States v.Robinson*, 560 F.2d at 517, *citing United States v. Green*, 523 F.2d 229, 236 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). We have recognized that the district court may instruct the jury in an evenhanded, noncoercive manner that it would prefer a unanimous verdict if accomplished "without any juror yielding a conscientious conviction which he or she may have." *United States v. Rao*, 394 F.2d at 355; *see United States v. Barash*, 412 F.2d 26, 32 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969). This charge, first recognized by the Supreme Court in *Allen v. United States*, 164 U.S. 492 (1896), remains valid in our Circuit. *See United States v. Robinson*, 560 F.2d at 517.

Finally, the length of time between the court's instruction and the actual rendering of the jury verdict is probative of the fact that the jury was not coerced or

unduly influenced by the judge's remarks. The request for instruction occurred shortly after 12:00 noon on Saturday and the jury submitted additional requests and continued to deliberate until 6:25 p.m. When deliberations resumed on Monday, the jury submitted several other requests for instruction and did not reach a verdict until 5:20 p.m. on that day. This substantial interval between Judge Bramwell's remark and the rendering of the verdict indicates that the jury freely exercised its decisionmaking authority and was not unduly influenced by the court's instruction. *See United States v. O'Connor*, 580 F.2d 38, 44 (2d Cir. 1978) (Court permits two modified *Allen* charges, "especially since the jury, which had reported that it was hung, continued to deliberate for several hours after the second charge was given."); *United States v. Robinson*, 560 F.2d at 517.

C. Rule 30 Claim

During the course of trial, the government called Christine Siano to testify to the substance of a conversation between herself and her neighbor, Tony Perla. She testified that Perla, when asked about the SI article implicating him in the B.C. scandal, had remarked: "[S]o I shaved a few games, it is no big deal, and they're not going to put me away for this." At the close of trial, the government submitted a request to charge asking the court to instruct the jury that the Perla statement constituted an admission. Judge Bramwell read this request during his charge conference and then inquired whether the defendants objected to the government's proposal. The following colloquy occurred at that point:

> Mr. Zimmerman (counsel for Kuhn); I object to that.
>
> The Court: That is request number 13.
>
> Mr. Zimmerman: I object to the wording.
>
> The Court: What do you say?

> Mr. McDonald (the prosecutor): My objection is that you did not include Anthony Perla in there. The statement which he made to Christine Cianna [sic].
>
> The Court: Just a moment. I'm going to leave that out.

Counsel for appellant Tony Perla argues on appeal that he interpreted Judge Bramwell's remark to mean that the court would not instruct the jury that Perla's statement to Siano constituted an admission. He asserts that his closing arguments were prepared with the expectation that Perla's statement to Siano would not be included in the court's instruction. Perla contends that Judge Bramwell committed reversible error under Fed. R. Crim. P. 30 when he later revised the jury instruction to include the Perla admission after closing arguments had been completed.

Counsel's arguments are not persuasive because Perla's statement clearly constituted an admission. Given that fact, it is readily apparent that Judge Bramwell's remark at the charge conference, albeit somewhat unclear, referred not to his decision to forego an instruction on Perla's admission, but rather reflected his decision not to use the government's proposed instruction. If counsel did not fully understand this remark, he should have asked for clarification because he could not have reasonably expected that the court would gloss over this important testimony. Indeed, when counsel for Perla objected to the admissibility of the Siano testimony earlier in the trial, the court specifically stated that Perla's inculpatory statement "[c]omes in as an admission."

D. Failure to Instruct the Jury on a Theory of the Case

Appellants Kuhn, Rocco Perla and Tony Perla argue that their complicity, if any, in the point shaving scheme was limited to buying and selling inside information on B.C. games, but did not extend to "point shaving" as the government had alleged. They argue that the "inside information" theory constituted a legally sufficient defense to the government's RICO charges and assert that the district judge committed reversible error under Fed. R. Crim. P. 30 when he failed to instruct the jury on this theory.

Every criminal defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury. Fed. R. Crim. P. 30. The request to charge under Rule 30 must identify, with some reasonable degree of clarity, the theory of the case desired by the defendant. *See United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980) (defenses must be "squarely interposed").

In this action, the appellants did not request that the jury be instructed on their "inside information" theory. They did not object to the court's failure to give that specific charge. "In the absence of clear error by the trial court in its instructions, failure to make timely request for, or objection to, instructions to the jury waives all objections to the charge given. Fed. R. Crim. P. 30." *United States v. Bermudez*, 526 F.2d at 97; *see also United States v. Grammatikos*, 633 F.2d at 1022; *United States v. Barash*, 412 F.2d 26, 33 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969).

The court's failure to instruct on the "inside information" theory was not clear error. Defense counsel never even hinted at trial that the appellants had paid or received money for providing inside information on B.C.

basketball games. The court properly limited its instruction to those defenses that could be fairly gleaned from the evidence. No error is shown here.

F. Denial of Hearing on Preindictment Publicity

The appellants maintain that their right to a fair, impartial trial was jeopardized due to the widespread, adverse publicity generated by the SI expose of the B.C. conspiracy. They argue that the district judge committed reversible error when he denied their request for a preindictment hearing to determine whether the grand jury could give fair and impartial consideration to their case.

When a person is brought before the grand jury and charged with a criminal offense, that individual is constitutionally entitled to have his case considered by an impartial and unbiased grand jury. *See Lawn v. United States*, 355 U.S. 339, 349-50 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956). The grand jury need not deliberate in a sterile chamber, however, to satisfy this constitutional guarantee, *see United States v. Nunan*, 236 F.2d 576, 593 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); *United States v. Myers*, 510 F.Supp. 323, 325 (E.D.N.Y. 1980), and a criminal conviction appealed on grounds of adverse preindictment publicity will not be overturned unless the moving party can "bear the heavy burden of demonstrating that he has suffered actual prejudice as a result of the publicity." *United States v. Myers*, 510 F.Supp. at 325-26; *see United States v. Mandel*, 415 F.Supp. 1033, 1061-65 (D. Md. 1976), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347, *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979) (en banc).

The appellants have failed to cite any persuasive evidence of actual grand jury prejudice in the preindictment stage of this criminal action. They contend in very general terms that the SI article and the adverse

publicity generated by this story prejudiced them, an argument which is clearly insufficient to warrant reversal under prevailing law. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549 (1962); *United States v. Nunan*, 236 F.2d at 593.

G. Limit on Cross-Examination/Refusal to Sever

Counsel for appellant Burke indicated at the commencement of trial they were concerned that Henry Hill would implicate Burke in criminal activities, including the Lufthansa robbery, that were unrelated to the pending charges. Counsel asked the court to restrict any examination of Hill that might elicit answers implicating Burke in other crimes. Judge Bramwell made two significant evidentiary rulings at this point in the trial. He ordered the prosecutor to warn Hill that he should limit his testimony to facts relevant to the pending criminal charges. The court also ruled that, due to the widespread publicity surrounding Lufthansa and Burke's reputed involvement in that crime, any testimony relating to Lufthansa would be limited to general discussion of a significant robbery. Counsel for Kuhn, Anthony Perla and Rocco Perla then moved to sever their trial from the Burke action, arguing that they were unduly prejudiced by the court's evidentiary rulings. This motion was denied by the court.

The Perlas and Kuhn charge on appeal that Judge Bramwell committed reversible error when he denied them the right to conduct wide-ranging cross-examination of Hill that would have exposed a serious incident of misconduct reflecting on credibility. They argue that Hill was a critical prosecution witness whose motive to fabricate—*i.e.*, to curry favor with the government and thus gain immunity for his many criminal offenses—was not fully developed at trial due to the court's evidentiary rulings. Finally, the appellants contend that the court should have at least granted their motion to sever, thereby eliminating any prejudice to their defense.

Regarding the admissibility of impeachment evidence, we have recognized that the trial judge, who can observe first hand the credibility of witnesses and general tenor of the trial, is especially well suited to resolve these issues. Hence, we have accorded the trial judge considerable discretion in this area. *United States v. Stahl*, 616 F.2d 30, 33 (2d Cir. 1980); *see also United States v. Rogers*, 549 F.2d 490, 496-97 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1977).

The trial court's decision to circumscribe defense counsel's efforts to impeach Hill was an appropriate exercise of its discretion. The only possible advantage to be gained by pursuing the Lufthansa line of questioning, *i.e.*, further impeaching the credibility of Hill, was substantially outweighed by the strong possibility that the jury would exaggerate the importance of this testimony. Moreover, the court did permit counsel to establish that Hill had been linked to a significant robbery. Counsel was allowed to introduce a redacted version of Hill's immunity agreement and thus the jury was fully aware of his motives for testifying. This evidence, viewed together with the additional impeachment testimony independently introduced against Hill, reveals that Hill had been thoroughly impeached at trial. No error is shown here.

We also affirm the district judge's decision to deny counsel's motion to sever. The judge is empowered under Fed. R. Crim P. 14 to sever the trials of criminal defendants if he determines that the parties will be unduly prejudiced by a joint prosecution. That decision is committed, however, to the broad discretion of the trial judge, *see United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980); *United States v. Ochs*, 595 F.2d 1247, 1260-61 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979), and a denial of a Rule 14 motion will not be overturned on appeal unless the defendant meets the following heavy burden:

> The burden is upon a moving defendant to show facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial. The defendant must demonstrate that he suffered such prejudice as a result of the joinder, not that he might have had a better chance for acquittal at a separate trial.

United States v. Rucker, 586 F.2d 899, 902 (2d Cir. 1978), *citing United States v. Borelli*, 435 F.2d 500 (2d Cir. 1970), *cert. denied*, 401 U.S 946 (1971). The court did not abuse its discretion when denying the appellants' motion to sever. Important judicial economies were served by joining these criminal trials and the appellants have been unable to show that they were severely prejudiced or denied a fair trial because their cases were tried together.

H. Kuhn Inculpatory Statement

On September 3, 1980, FBI agents James Byron and Thomas Sweeney visited the family home of appellant Kuhn in Swissvale, Pennsylvania. The agents asked Kuhn whether he would be willing to discuss events surrounding the 1978-79 B.C. basketball season. Kuhn inquired whether he was required to talk, and the agents responded that, although they would appreciate his cooperation, he was not legally obligated to answer their questions.

Kuhn agreed to talk with the agents, but asked that the conversation be continued outside his home. They agreed to continue the discussion in the FBI car parked outside the Kuhn home. Once inside the car, Kuhn again asked whether he was required to speak with the agents and they explained that he was not legally bound to answer their questions. Kuhn then made several inculpatory statements.

At trial FBI Agent Byron testified to the substance of Kuhn's admission, but omitted any reference to remarks that implicated Kuhn's co-defendants in the criminal enterprise. On appeal, Kuhn argues that the court should have suppressed this testimony because it was obtained in violation of his Fifth Amendment rights. Specifically, Kuhn asserts that since his admissions were the product of a custodial interrogation, the FBI agents should have given *Miranda* warnings before questioning him. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Both parties agree that Agents Sweeney and Byron did not apprise Kuhn of his *Miranda* rights before he admitted complicity in the point shaving scheme.

The courts have frequently been asked, in the wake of the Supreme Court's landmark *Miranda* decision, to determine the precise point at which the Fifth Amendment demands that *Miranda* warnings be given. The Supreme Court has stated that warnings are constitutionally required where the accused has been arrested or is required to submit to a "custodial interrogation." *Id.* at 444; *see Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) (per curiam); *Beckwith v. United States*, 425 U.S. 341, 345 (1976). "Custodial interrogation" has been defined to include situations in which the accused is "taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444; *see Oregon v. Mathiason*, 429 U.S. at 494. *Miranda* warnings need not be delivered in a non-custodial interrogation even if the government's criminal investigation has reached a stage where the defendant is the focus of the inquiry. *See Beckwith v. United States*, 425 U.S. at 345.

In this action, Judge Bramwell properly ruled that Kuhn's admissions were not the product of a custodial interrogation. The FBI agents advised Kuhn, at two separate points during their conversation, that he was not legally obligated to speak with them. In fact, even

after he admitted complicity in the point shaving scheme, the agents left the Kuhn property without arresting or otherwise restricting his freedom. The defendant has failed to convince us on appeal that his freedom of movement was impaired or restricted by Agents Byron and Sweeney. *See Oregon v. Mathiason*, 429 U.S. at 495 (after bringing the defendant into an interrogation room at the police station, officer [falsely] stated that defendant's fingerprints were found at the scene of the crime: held, no Miranda problems because the defendant was not arrested, nor was his freedom of movement restricted in any way when he voluntarily confessed to the crime).

I. Bruton *Claim*

When Kuhn admitted to his complicity in the point shaving scheme, he also implicated appellants Tony Perla, Rocco Perla and Paul Mazzei. At trial, FBI Agent Byron testified to the substance of Kuhn's inculpatory statements, but omitted any specific reference to the co-defendants.[10] The appellants contend on appeal that even though Agent Byron did not specifically identify them when recounting Kuhn's statements, the jury could readily infer from his testimony that Kuhn was referring to them when confessing to complicity in the scandal. The Perlas and Mazzei argue that their Sixth Amendment right of confrontation was violated by the court's decision to permit Agent Byron to testify to the redacted confession. They contend that Kuhn's statements, as recounted by witness Byron, referred to them by implication and thus should have been excised because Kuhn never testified at trial.

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[10] The prosecution initially proposed that a redacted version of Kuhn's statement be read to the jury. Judge Bramwell ruled that Agent Byron should testify to his recollection of the meeting with Kuhn, using this statement to refresh his recollection.

In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that the admission of a non-testifying defendant's statement which implicated a co-defendant violated the Sixth Amendment Confrontation Clause. The *Bruton* rule has been fully explored by this Court. A redacted statement of a non-testifying defendant is admissible if not clearly inculpatory as to a co-defendant or vitally important to the government's case against the co-defendant, and if the court provides cautionary instructions limiting the use of the statement against its maker. *See United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). To be clearly inculpatory, the redacted statement, standing alone, must connect a co-defendant with the crime. Thus, where the redacted statement does not mention a co-defendant's name or provide a physical description, its admission would not violate *Bruton*. *See United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978). However, a redacted statement is clearly inculpatory where the jury is aware that *names* have been redacted and, in light of other evidence, could infer that the omitted names may have included a co-defendant's. *See United States v. Danzey*, 594 F.2d 905, 917-18 (2d Cir.), *cert. denied*, 441 U.S. 951 (1979).

This Circuit has consistently dismissed *Bruton* claims in situations where, as here, the inculpatory statement of a co-defendant does not independently implicate the appellant. *See United States v. Knuckles*, 581 F.2d at 313; *United States v. Wingate*, 520 F.2d at 314. In *United States ex rel. Nelson v. Follette*, 430 F.2d 1055 (2d Cir. 1970), the co-defendant confessed that he and "Oliver" had been involved in a robbery and murder. Nelson objected to the admissibility of his co-defendant's confession at their joint trial on the ground that the jury could infer from independently introduced evidence that he was "Oliver." The Court rejected this *Bruton* claim, holding that the contested admission was not

"clearly inculpatory" to Nelson because it alone did not serve to connect him with the crime. *Id.* at 1058.

In this action, the court properly limited Agent Byron's testimony to exclude all specific references to Mazzei or the Perla brothers. The court correctly instructed the jury that the Byron testimony could be used as evidence only against Kuhn. Moreover, the jury was not aware that Agent Byron edited Kuhn's statements to exclude specific reference to co- conspirators identified by Kuhn. *Cf. United States v. Danzey*, 594 F.2d at 917 (jury aware that names redacted). Nor was Agent Byron's testimony such that the jury could infer with confidence, based upon Kuhn's admissions standing alone, that Kuhn was identifying a particular appellant when he related his story to Agent Byron. We reject this claim as well.

The judgment of the district court is affirmed.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighth day of March, one thousand nine hundred and eighty-three.

Nos. 82-1028, 1030, 1032, 1056

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES BURKE, ANTHONY PERLA, ROCCO PERLA, and RICHARD KUHN,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, James Burke,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing and Suggestion for
Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by s/s Francis X. Gindhart,
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1799

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly declined to order production of a reporter's notes and records when the reporter himself testified at trial.

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JAMES BURKE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 700 F.2d 70.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1983, and a petition for rehearing was denied on March 8, 1983. The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to conduct an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d)), conspiracy to commit sports bribery (18 U.S.C. 224), and interstate travel

to commit bribery (18 U.S.C. 1952).[1] He was sentenced to 20 years' imprisonment. The court of appeals affirmed. Pet. App. 1a-28a.

1. The evidence at trial showed that petitioner, along with Henry Hill and co-defendants Paul Mazzei, Rocco and Anthony Perla, and Richard Kuhn conspired to "shave points" from the Boston College (B.C.) basketball team's scores in the 1978-1979 season in order that the conspirators might profit from betting on games. The Perla brothers began the scheme by recruiting Kuhn, who was about to begin his senior year at B.C. and was a key member of the basketball team. Kuhn agreed to ensure that B.C.'s point total fell below the gambling "point spread," or expected margin of victory.[2] The Perla brothers then contacted Mazzei; through Mazzei, they contacted Hill, who reputedly was an underworld figure. The Perla brothers and Mazzei hoped that Hill would obtain protection from petitioner —Hill's underworld "boss" — in the event that bookmakers discovered that they were being swindled and sought retribution. Pet. App. 3a-4a.

In November 1978, petitioner, Hill, Mazzei, and Tony Perla met, and petitioner and Hill joined the scheme. Pet. App. 4a; Tr. 218-220, 235-236.[3] At petitioner's direction,

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[1]Co-defendants Anthony and Rocco Perla and Richard Kuhn were convicted on the same charges, and their convictions were affirmed with petitioner's. Co-defendant Paul Mazzei's conviction was affirmed separately (*United States* v. *Mazzei*, 700 F.2d 85 (2d Cir. 1983)), and this Court denied certiorari (No. 82-6449 (May 23, 1983)).

[2]Because gamblers betting on college basketball games generally bet not that a particular team will win but that it will win by the number of points designated by a uniform betting "line" established by bookmakers, the knowledge that B.C. would always do somewhat worse than expected would be valuable to bettors. See Pet. App. 3a n.2.

[3]We rely on the brief filed by the United States Attorney in the court of appeals for citations to the trial transcript.

Hill, Mazzei, and Tony Perla then met with Kuhn to plan the scheme. They agreed that the Providence game on December 6, in which B.C. was favored by six points, would be their first point shaving effort. Pet. App. 4a. But the conspirators lost their bets on that game when B.C. won by 19 points. As a result, the group decided to recruit additional B.C. players. Ernie Cobb, the team's leading scorer, agreed to participate (*id.* at 4a-5a), and when petitioner learned of Cobb's cooperation, he gave Hill $5,000 to pay Kuhn and Cobb. Tr. 269.

B.C. was favored to win its next game, against Harvard, by 12 points but instead won only by three points; the bettors, having succeeded, paid Kuhn for his efforts. The conspirators also won their bets on B.C.'s next game, a loss to U.C.L.A. by more than the designated point spread; this was the first game in which the players agreed to lose by more than expected (as opposed to holding down B.C.'s score in games it won). Pet. App. 5a & n.3. Petitioner bet on U.C.L.A. Tr. 278. After similar success in a January 10, 1980, game against Rhode Island, petitioner and Hill concluded that bookmakers were likely to become suspicious of them, and they decided to bet on B.C. to win by more than the point spread in a game they were confident that B.C. would win handily. Pet. App. 5a; Tr. 287-288. The January 17 University of Connecticut game proved successful in this respect for the conspirators. Pet. App. 5a.

They then returned to their original strategy for B.C.'s games against Fordham, St. John's, and Holy Cross. The Holy Cross game, a televised traditional rivalry, attracted the heaviest betting. When Mazzei said that the B.C. players had agreed to lose the Holy Cross game, petitioner bet heavily on Holy Cross. Pet. App. 6a; Tr. 297, 300. Tony Perla told Kuhn that if the conspirators won their bets on

the Holy Cross game, the players would each receive $10,000. Tr. 957-958. B.C. lost, but by less than the point spread, so petitioner and the others lost their bets. Pet. App. 6a.

The scheme unraveled when Hill was indicted on other charges by New York authorities. In the course of questioning on those charges, Hill said that he had participated in a point shaving scheme involving the B.C. basketball team. He offered to relate everything he knew about it if federal officials would guarantee him immunity on such charges and would intercede on his behalf in his state prosecution. Pet. App. 6a-7a.

2. Before the trial, Hill described the conspiracy to Douglas Looney, a reporter for *Sports Illustrated*. Robert Simels, Hill's attorney, was present at each interview between Looney and Hill. In February 1981, the magazine published a story by Looney based on Hill's account. Pet. App. 8a, 11a-12a n.8.

Petitioner served a subpoena on Time, Inc., *Sports Illustrated*'s parent company, seeking virtually every record, note, or tape concerning Looney's article. Time moved to quash the subpoena, arguing that it abridged the reporter's First Amendment privilege and that it was overbroad. The district court granted the motion to quash, ruling that petitioner could renew his request after Hill testified at trial. Pet. App. 8a.

Hill testified at the trial, incriminating petitioner and the other defendants. The defendants vigorously sought to impeach Hill. They brought to light his extensive criminal background; they also showed that the government had entered into an immunity agreement with Hill in return for his testimony. In addition, the district court, over Time's

objection, ordered Looney to testify. Looney related various inconsistencies between the account Hill had given him and Hill's testimony at trial. Pet. App. 9a.

After Hill testified, the district court again granted Time's motion to quash the subpoena for records. The court noted that the only purpose for which petitioner sought these documents was to impeach Hill; the court ruled that in view of the abundant material available for that purpose, including Looney's testimony, the documents would be only cumulative. In addition, petitioner made no effort to subpoena Simels — a possible alternative source of any impeaching material contained in the subpoenaed documents — even though Simels could have testified about the conversations between Hill and Looney without violating the attorney-client privilege. Pet. App. 9a, 11a-12a n.8.

3. The court of appeals rejected petitioner's contention that the district court erred in not ordering the production of the *Sports Illustrated* documents or reviewing them in camera. Pet App. 8a-13a. The court of appeals agreed with the district court that petitioner "completely failed to make the clear and specific showing that these documents were necessary or critical to the maintenance of his defense." *Id.* at 11a. The court of appeals noted that in previous cases it had ruled that because of " 'the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.' " *Id.* at 9a, quoting *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982). Because of the wealth of other material petitioner used to impeach Hill, and because Looney testified — and Simels could have

testified, had petitioner subpoenaed him — about Hill's conversations with Looney, the court ruled that petitioner had not made the necessary showing.

ARGUMENT

Rule 17(c), Federal Rules of Criminal Procedure, provides that a court may quash a subpoena "if compliance would be unreasonable or oppressive." This Court has held that a district court may use its authority to quash in order to restrict Rule 17(c) subpoenas to "evidentiary" materials and to prevent them from becoming "an additional means of discovery." *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 219-220 (1951). Here, the district court concluded that in view of the abundant material petitioner could have used, and did use, to impeach Hill — including the reporter's testimony — compliance with petitioner's sweeping subpoena duces tecum was unnecessary. The court of appeals agreed with that determination, which was manifestly reasonble and, in any event, depends on the particular facts of this case and therefore does not warrant this Court's review.

Petitioner does not deny that he sought the documents from Time solely because he wished to use them to impeach Hill. Nor does he deny that a vast amount of other impeaching material was available; indeed, much of the petition is devoted to a recitation of reasons for disbelieving Hill that were developed at trial. See, *e.g.*, Pet. 4 n.4, 10-13. Petitioner also does not explain why the documents he subpoenaed would have aided in his defense; if petitioner wished to identify inconsistencies between the account Hill gave to Looney in the course of writing the magazine article and the account Hill gave at trial, Looney's own testimony would appear to have been more than adequate.

Instead, petitioner appears to contend that the court of appeals and the district court erred in allowing "First Amendment" concerns to enter into the decision whether to quash the subpoena. Pet. 18. But in making the necessarily discretionary determination required by Rule 17, a judge will frequently assess the extent to which a subpoena unreasonably burdens the custodian of the subpoenaed documents. When that burden falls on interests that implicate the First Amendment, nothing in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), precludes the court from taking that factor into account as well. See *id.* at 707 ("news gathering is not without its First Amendment protections"); *id.* at 710 (Powell, J., concurring) ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

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